COSWAY (M) SDN BHD & ANOR

v.

GAN POH IM

COURT OF APPEAL, PUTRAJAYA
ABDUL MALEK AHMAD PCA
ARIFIN ZAKARIA JCA
TENGKU BAHARUDIN SHAH JCA
[CIVIL APPEAL NO: P-04-72-01]
27 JANUARY 2005

CIVIL PROCEDURE: *Appeal - Memorandum of appeal - Filing of - Memorandum of appeal filed together with record of appeal - No filing fee paid for filing of memorandum - Whether filing of memorandum of appeal defective*

CIVIL PROCEDURE: *Appeal - Memorandum of appeal - Appeal from sessions court to High Court - Reckoning of time for filing memorandum of appeal - Whether within 14 days from receipt of Form 141 - Whether within six weeks from receipt of Form 141*

CIVIL PROCEDURE: *Appeal - Memorandum of appeal - Filing of - Filing out of time - Whether court has discretion to extend time for such filing - Factors to be considered in exercising discretion*

CIVIL PROCEDURE: *Appeal - Time - Extension of time to file memorandum of appeal - Whether at discretion of court - Factors to be considered in exercising discretion*

The appellants decided to appeal against a sessions court's decision favouring the respondent. They filed their notice of appeal on 19 February 1998. On 9 April 1998, Form 141 was issued by the sessions court. The appellants filed their appeal record, incorporating the memorandum of appeal dated 18 May 1998, on 21 May 1998. However no filing fee was paid. On 8 October 1998, the appellants filed the same memorandum of appeal with the prescribed filing fee. On 14 December 1998, the respondent's solicitors gave notice of preliminary objection on the ground that the memorandum of appeal was filed out of time. By notice of motion dated 25 May 1999, the appellants applied for extension of time to file and serve their memorandum of appeal. The notice of motion was heard by the High Court together with the appeal on 1 November 1999. The High Court allowed the respondent's preliminary objection, dismissed the notice of motion and further dismissed the appeal with costs. The High Court *inter alia* held that since the Rules Committee had

removed the words 'or within such extended time as the court may allow' appearing in the original O. 55 r. 2(1) Rules of the High Court 1980 ('RHC'), the 14 days prescribed under the current O. 55 r. 2(1) RHC provision was a mandatory provision and had to be strictly complied with. Relying on the then Federal Court decision of *Gan Hay Chong v. Siow Kian Yuh & Anor* [1975] 2 MLJ 129, the High Court Judge held that ignorance of procedural law was not a sufficient ground upon which the court could exercise its discretion to enlarge time. The appellants appealed to the Court of Appeal. Appellants' counsel contended that the High Court judge had, in the circumstances of the case, erred in the exercise of discretion in dismissing the application for extension of time to file the memorandum of appeal. Counsel also argued that the delay in filing the memorandum of appeal was due to ambiguity and uncertainty as to whether the memorandum of appeal had to be filed separately within 14 days from the receipt of Form 141, or whether it had to be filed together with the appeal record within six weeks from the receipt of Form 141. Counsel submitted that there were two lines of authorities dealing with such issue. In *Kuching Pharmacy Sdn Bhd v. JL Morison Son & Jones (M) Sdn Bhd* [1990] 1 CLJ 508; [1990] 2 CLJ (Rep) 293 as followed in *Shafie bin Ahmad v. Hajjah Fatimah bte Ahmad & 3 Ors* [1991] 3 CLJ 2217; [1991] 3 CLJ (Rep) 719 it was decided that an appellant has six weeks from the date of receipt of Form 141 to file the memorandum of appeal. However in *Elayachee v. Woo Siu Tip* [1991] 3 MLJ 108 and *Hj Abdul Ghani bin Kesah v. Tuan Ahmad bin Tuan Man* [1990] 3 MLJ 45, it was decided that the memorandum of appeal must be filed within 14 days from the receipt of Form 141.

Held (allowing the appeal)
Per Arifin Zakaria JCA delivering the judgment of the court:

[1] In the instant case, the memorandum of appeal was filed twice. It was first filed together with the appeal record on 21 May 1998, and thereafter it was filed separately on 8 October 1998. No filing fee was paid when filing the memorandum the first time. Further, O. 49 r. 3A(1) of the Subordinate Courts Rules 1980 ('SCR') does not require the memorandum of appeal to be included in the appeal record. It was thus no excuse for the appellants to file the memorandum of appeal together with the appeal record. Also the prescribed time for the filing of the appeal record is 6 weeks from the service of Form 141 whereas the prescribed time for filing of the memorandum of appeal as provided in O. 55 r. 2(1) RHC is 14 days from the date of service of Form 141. The filing of the memorandum

of appeal the first time was thus defective and therefore the application for extension of time for the filing of the memorandum of appeal could only be considered in relation to the second memorandum of appeal filed on 8 October 1998. (p 581 c-f)

[2] Having examined O. 49 rr. 3 and 3A of the SCR and O. 55 r. 2(1) RHC the Court of Appeal expressed a preference for the views of Lamin J in *Hj Abdul Ghani bin Kesah v. Tuan Ahmad bin Tuan Man* and Eusoff Chin J in *Elayachee v. Woo Siu Tip* [1991] 3 MLJ 108, rather than those of Haidar J in *Kuching Pharmacy Sdn Bhd v. JL Morison Son & Jones (M) Sdn Bhd* [1990] 1 CLJ 508; [1990] 2 CLJ (Rep) 293. Order 55 r. 2(1) RHC on its proper construction admitted no ambiguity as contended by counsel for the appellants. In any event in the instant case, the delay in filing the second memorandum of appeal could not in any way be attributed to the alleged ambiguity. The second memorandum of appeal was filed way pass the six-week period prescribed for the filing of the appeal record. The delay arose purely out of the mistake of the appellants' solicitors in failing to file the memorandum of appeal separately from the appeal record as required by the rules. (p 584 e-g)

[3] The deletion of the words 'or within such extended time as the court may allow' in O. 55 r. 2(1) RHC would not deprive the court of its discretion to extend time. Such discretion is expressly conferred by O. 3 r. 5(1) RHC which deals with extension or abridgment of time specified in the rules. Under the present provision of O. 55 r. 2(1) RHC, the court still has the discretion to extend the time prescribed therein. In *Gan Hay Chong v. Siow Kian Yuh & Anor* [1975] 2 MLJ 129 the then Federal Court did not lay down the general rule that a mistake by a solicitor was not a sufficient ground for granting an extension of time to file a notice of appeal or a memorandum of appeal. In *Gan Hay Chong*, the Federal Court did not exercise its discretion in favour of the appellant on the particular facts of that case. In the instant case, the High Court had acted on a wrong principle and it was open to the Court of Appeal to consider whether there was sufficient material to merit the exercise of discretion in favour of the appellants. (pp 585 c-g & 586 a-d)

[4] In the instant case, non-compliance was due to the mistake of the former solicitors of the appellants. The appellants were not at all to blame. The appeal record had been filed earlier within the stipulated time. The memorandum of appeal was also filed earlier together with the appeal record, albeit erroneously. The respondent had notice of the grounds upon

which the appellants were relying in the appeal. Thus the respondent could not be seriously prejudiced by the non-compliance. After realizing their error, the appellants' solicitors filed the memorandum of appeal out of time and filed the application for extension of time. Even though the application was made after receipt of the notice of preliminary objection, it was merely to regularize the filing and service of the memorandum of appeal. The conduct of the appellants' solicitors could not be regarded as a blatant disregard of the rules of court. There was indeed a misapprehension of the rules of court but remedial steps were taken to comply with the rules. There were also merits in the instant case. The High Court was wrong in coming to its decision as it had acted on a wrong principle. The appeal should therefore be allowed. (pp 586 g & 588 a-f)

Per curiam:

[1] It is settled law that the appellate court should be slow to interfere with the exercise of judicial discretion by the court below and there is a presumption that the court below has rightly exercised its discretion. The appellate court will only interfere, if it is satisfied that the judge in whom the primary discretion is vested, has failed to take into account relevant considerations. (pp 580 g-h & 581 a-b)

*[**Bahasa Malaysia** Translation Of Headnotes*

Perayu-perayu ingin merayu terhadap keputusan mahkamah sesyen kerana membuat keputusan yang berpihak kepada responden dan telah memfail notis rayuan pada 19 Februari 1998. Berikutnya, pada 9 April 1998, Borang 141 telah dikeluarkan oleh mahkamah sesyen. Pada 21 Mei 1998, perayu-perayu memfail rekod rayuan mereka yang bertarikh 18 Mei 1998. Bagaimanapun tiada fee pemfailan telah dibayar. Pada 8 Oktober 1998, perayu-perayu memfail memorandum rayuan yang sama dengan bayaran fee yang ditetapkan. Pada 14 Disember 1998, peguam responden memberi notis bantahan awal atas alasan bahawa memorandum rayuan telah difail di luar masa. Melalui notis usul bertarikh 25 Mei 1999, perayu-perayu memohon perlanjutan masa dan menyerahkan memorandum rayuan mereka. Notis usul didengar oleh Mahkamah Tinggi bersekali dengan rayuan pada 1 November 1999. Mahkamah Tinggi membenarkan bantahan awal responden, dan menolak notis usul dan rayuan dengan kos. Antara lain, Mahkamah Tinggi memutuskan bahawa oleh kerana Jawatankuasa Pengkaedahan telah membuang perkataan-perkataan 'atau dalam masa lanjutan seperti yang dibenarkan oleh mahkamah' yang terdapat pada peruntukan asal A. 55 k. 2(1) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'), masa 14 hari yang ditetapkan dalam peruntukan semasa A. 55

k. 2(1) KMT adalah suatu peruntukan mandatori dan perlu dipatuhi sepenuhnya. Dan, dengan bergantung kepada kes Mahkamah Persekutuan *Gan Hay Chong v. Siow Kian Yuh & Anor* [1975] 2 MLJ 129, yang arif hakim Mahkamah Tinggi memutuskan bahawa kejahilan undang-undang prosedur bukanlah alasan mencukupi bagi mahkamah melaksanakan budibicara untuk melanjutkan masa. Perayu-perayu merayu ke Mahkamah Rayuan. Peguam perayu-perayu berhujah bahawa hakim Mahkamah Tinggi, dalam halkeadaan kes, telah tersalah-laksana budibicara apabila menolak permohonan untuk lanjutan masa untuk memfail memorandum rayuan. Peguam juga berhujah bahawa kelewatan memfail memorandum rayuan adalah disebabkan oleh kekaburan/ketidakpastian sama ada memorandum rayuan perlu difailkan secara berasingan dalam masa 14 hari dari tarikh penerimaan Borang 141, atau harus difailkan serentak bersama-sama dengan rekod rayuan dalam masa enam minggu dari tarikh penerimaaan Borang 141. Peguam menghujah bahawa terdapat dua jalur autoriti berkaitan isu ini. Menurut peguam, dalam kes *Kuching Pharmacy Sdn Bhd v. JL Morison Son & Jones (M) Sdn Bhd* [1990] 1 CLJ 508; [1990] 2 CLJ (Rep) 293 seperti yang diikuti oleh *Shafie bin Ahmad v. Hajjah Fatimah bte Ahmad & 3 Ors* [1991] 3 CLJ 2217; [1991] 3 CLJ (Rep) 719, ianya diputuskan bahawa perayu mempunyai masa enam minggu dari tarikh penerimaan Borang 141 untuk memfail memorandum rayuan. Bagimanapun, dalam kes *Elayachee v. Woo Siu Tip* [1991] 3 MLJ 108 dan *Hj Abdul Ghani bin Kesah v. Tuan Ahmad bin Tuan Man* [1990] 3 MLJ 45, telah diputuskan bahawa memorandum rayuan mestilah difailkan dalam masa 14 hari dari tarikh penerimaan Borang 141.

Diputuskan (membenarkan rayuan)
Oleh Arifin Zakaria HMR menyampaikan penghakiman mahkamah:

[1] Dalam kes semasa, memorandum rayuan telah difailkan sebanyak dua kali. Ia mulanya difailkan bersama rekod rayuan pada 21 Mei 1998, dan kemudian difailkan secara berasingan pada 8 Oktober 1998. Tiada fee pemfailan dibayar apabila ia difailkan pada kali pertama. Selain itu, A. 49 k. 3A(1) Kaedah-Kaedah Mahkamah Rendah 1980 ('KMR') tidak memerlukan supaya memorandum rayuan dimasukkan ke dalam rekod rayuan. Dengan itu tiada alasan kenapa perayu-perayu harus memfail memorandum rayuan bersama-sama dengan rekod rayuan. Lagipun, masa yang ditetapkan bagi pemfailan rekod rayuan adalah enam minggu dari tarikh penyerahan Borang 141, sementara masa yang ditetapkan bagi memfail memorandum rayuan seperti yang tertera dalam A. 55 k. 2(1) KMT adalah 14 hari dari tarikh penyerahan Borang 141. Oleh yang demikian, pemfailan memorandum rayuan pada kali pertama adalah cacat, yang berakibat, permohonan bagi perlanjutan masa untuk memfail memorandum rayuan hanya boleh dipertimbang bagi memorandum rayuan kedua yang difailkan pada 8 Oktober 1998.

[2] Meneliti A. 49 kk. 3 dan 3A KMR dan A. 55 k. 2(1) KMT Mahkamah Rayuan lebih cenderung untuk menerimapakai pandangan-pandangan Lamin H dalam *Hj Abdul Ghani bin Kesah v. Tuan Ahmad bin Tuan Man* dan Eusoff Chin H dalam *Elayachee v. Woo Siu Tip* [1991] 3 MLJ 108; berbanding dengan pandangan Haidar H dalam *Kuching Pharmacy Sdn Bhd v. JL Morison Son & Jones (M) Sdn Bhd* [1990] 1 CLJ 508; [1990] 2 CLJ (Rep) 293. Aturan 55 k. 2(1) KMT atas pentafsirannya yang betul tidak memperlihatkan sebarang kekaburan seperti yang dihujah oleh peguam perayu-perayu. Walau apapun, dalam kes semasa, kelewatan dalam memfail memorandum rayuan kedua tidak langsung boleh dikaitkan dengan kekaburan yang didakwa itu. Memorandum rayuan kedua difailkan jauh melepasi tempoh enam minggu yang ditetapkan bagi pemfailan rekod rayuan. Kelewatan berlaku semata-mata atas kesilapan peguam perayu-perayu kerana gagal memfail memorandum rayuan secara berasingan dari rekod rayuan seperti yang dikehendaki oleh kaedah-kaedah.

[3] Pembuangan perkataan 'atau dalam masa lanjutan seperti yang dibenarkan oleh mahkamah' di dalam A. 55 k. 2(1) KMT tidak menghalang mahkamah dari melaksanakan budibicara untuk melanjutkan masa. Budibicara sedemikian diberi secara jelas oleh A. 3 k. 5(1) KMT yang menyentuh soal perlanjutan atau pemendekan masa yang ditetapkan dalam kaedah-kaedah. Di bawah peruntukan semasa A. 55 k. 2(1) KMT, mahkamah masih berbudicara untuk melanjutkan masa yang ditetapkan di dalamnya. Dalam *Gan Hay Chong v. Siow Kian Yuh & Anor* [1975] 2 MLJ 129, Mahkamah Persekutuan ketika itu tidak membuat apa-apa kaedah am bahawa suatu kesilapan oleh seorang peguam bukan alasan mencukupi untuk memberi perlanjutan masa bagi memfail notis rayuan atau memorandum rayuan. Dalam *Gan Hay Chong*, Mahkamah Persekutuan tidak melaksanakan budibicaranya dengan berpihak kepada perayu atas fakta khusus kes tersebut. Dalam kes semasa, Mahkamah Tinggi telah bertindak atas prinsip yang salah dan ianya terbuka kepada Mahkamah Rayuan untuk menimbang sama ada terdapat material yang mencukupi yang membolehkan pelaksanaan budibicara yang memihak kepada perayu-perayu.

[4] Dalam kes semasa, ketidakpatuhan berlaku kerana kesilapan peguam terdahulu perayu-perayu. Perayu-perayu tidak seharusnya disalahkan. Rekod rayuan telah difailkan lebih awal dan dalam masa yang ditetapkan. Memorandum rayuan juga telah difailkan lebih awal bersama-sama dengan rekod rayuan, walaupun secara tersilap. Responden mengetahui tentang alasan-alasan yang perayu-perayu bergantung dalam rayuan mereka. Maka responden tidaklah diprejudis dengan seriusnya oleh ketidakpatuhan.

Selepas menyedari kesilapan mereka, peguam perayu-perayu memfail memorandum rayuan di luar masa dan memfail permohonan untuk perlanjutan masa. Walaupun, permohonan dibuat selepas menerima notis bantahan awal, ianya hanyalah untuk membetulkan pemfailan dan penyerahan memorandum rayuan. Kelakuan peguam perayu-perayu boleh dianggap sebagai suatu pelanggaran peraturan-peraturan. Memang terdapat salahtanggap terhadap peraturan, namun tindakan memperbaiki telah diambil bagi mematuhi peraturan-peraturan tersebut. Kes semasa juga adalah bermerit. Mahkamah Tinggi telah silap dalam mencapai keputusannya dan telah bertindak atas prinsip yang salah. Rayuan dengan itu harus dibenarkan.

Per curiam:

[1] Sudah menjadi undang-undang yang mantap bahawa mahkamah rayuan tidak akan tergesa-gesa untuk campur tangan dalam pelaksanaan budibicara kehakiman oleh mahkamah di bawah dan terdapat andaian bahawa mahkamah di bawah telah melaksanakan budibicaranya dengan betul. Mahkamah rayuan akan hanya campur tangan, jika ia berpuashati bahawa hakim, kepada siapa budibicara utama diberikan, telah gagal mengambilkira pertimbangan-pertimbangan yang relevan.

Case(s) referred to:

Alloy Automative Sdn Bhd v. Enkei Automative Co Ltd & Anor [1997] 2 CLJ 392 CA ***(refd)***

Elayachee v. Woo Siu Tip [1991] 3 MLJ 108 ***(refd)***

Gan Hay Chong v. Siow Kian Yuh & Anor [1975] 2 MLJ 129 ***(refd)***

Hj Abdul Ghani Kesah v. Tuan Ahmad Tuan Man [1990] 3 MLJ 45 ***(refd)***

Joceline Tan Poh Choo & Ors v. V Muthusamy [2003] 3 CLJ 705 CA ***(refd)***

Karpal Singh Ram Singh v. DP Vijandran [2001] 3 CLJ 871 CA ***(refd)***

Kuching Pharmacy Sdn Bhd v. JL Morison Son & Jones (M) Sdn Bhd [1990] 1 CLJ 508; [1990] 2 CLJ (Rep) 293 HC ***(refd)***

Lee Guant Eng v. Tan Lian Kim [1985] 2 MLJ 196 ***(refd)***

Liew Yew Tiam & Ors v. Cheah Cheng Hoc & Ors [2001] 2 CLJ 385 CA ***(refd)***

Md Amin Md Yusof & Satu Lagi lwn. Cityvilla Sdn Bhd [2004] 2 CLJ 57 CA ***(refd)***

Paya Terubong Estates Sdn Bhd v. Pusaka Warisan Sdn Bhd [1998] 2 CLJ 909 CA ***(refd)***

Ratnam v. Cumarasamy & Anor [1965] 31 MLJ 228 ***(refd)***

Shafie Ahmad v. Hjh Fatimah Ahmad & Ors [1991] 3 CLJ 2217; [1991] 3 CLJ (Rep) 719 HC ***(refd)***

The "Lung Yung" The "Lung Yung" & "Thai Yung" Owners & Ors v. Sadit Timber Sdn Bhd & Ors [1983] 2 CLJ 246; [1983] CLJ (Rep) 252 FC ***(refd)***

Thiruchelvasegaram Manickavasegar v. Mahadevi Nadchatiram [1998] 4 CLJ 883 CA ***(refd)***

Vasudevan v. T Damodaran & Anor [1981] CLJ 84; [1981] CLJ (Rep) 101 FC ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 3 r. 5(1), O. 55 rr. 2(1), 4(3)
Subordinate Courts Rules 1980, O. 49 r. 3A(1)

For the appellants - V Sithambaram; M/s Sitham & Assoc
For the respondent - N Shanmugam; M/s Shan & Gooi

[Appeal from High Court, Pulau Pinang; Civil Appeal No: 12-19-1998]

Reported by Andrew Christopher Simon

JUDGMENT

Arifin Zakaria JCA:

This action was commenced by the respondent/plaintiff in the Sessions Court against the appellants/defendants. At the conclusion of the trial, the learned Sessions Court judge gave judgment in favour of the respondent. On 19 February 1998, the appellants filed their notice of appeal. Form 141 was issued by the Sessions Court on 9 April 1998. On 21 May 1998, the appellants filed the appeal record incorporating the memorandum of appeal dated 18 May 1998. On 8 October 1998, the appellants filed the same memorandum of appeal with the prescribed filing fee. On 14 December 1998, the respondent's solicitors gave notice of preliminary objection on the ground that the memorandum of appeal was filed out of time. By notice of motion dated 25 May 1999, the appellants applied for extension of time to file and serve the memorandum of appeal. The notice of motion was heard by the learned High Court judge together with the appeal on 1 November 1999 whereby she dismissed the notice of motion and allowed the preliminary objection of the respondent. The appeal was dismissed with costs. The appellants now appeal against the said decision of the learned High Court judge.

It is the contention of learned counsel for the appellants that the learned High Court judge had, in the circumstances of this case, erred in the exercise of her discretion in dismissing the appellants' application for extension of time to file the memorandum of appeal. It is settled law that the appellate court should be slow to interfere with the exercise of judicial discretion by the court below and secondly, there is a presumption that the court below has rightly exercised its discretion. For support, we would refer to the following authorities namely – *Ratnam v. Cumarasamy & Anor* [1965] 31 MLJ 228; *Vasudevan v. T. Damodaran & Anor* [1981] CLJ 84; [1981] CLJ (Rep) 101, *The "Lung Yung" The "Lung Yung" & "Thai Yung" Owners & Ors. v. Sadit Timber Sdn. Bhd. & Ors* [1983] 2 CLJ 246; [1983] CLJ (Rep) 252. In *Ratnam v. Cumarasamy (supra)*, Lord Guest expressed the view that "The court will not interfere unless it is clearly satisfied that the discretion has been exercised on

a wrong principle and should have been exercised in a contrary way or that there has been a miscarriage of justice *(Evans v. Bartlam)*". Adopting the position in *Vasudevan v. T. Damodaran & Anor*, Abdoolcader FJ in *The "Lung Yung"* stated thus "The exercise of judicial discretion by him is not to be lightly interfered with and there is a presumption that he has rightly exercised it ...". The appellate court will only interfere if it is satisfied that the judge in whom the primary discretion is vested has failed to take into account relevant considerations. (See *Paya Terubong Estates Sdn. Bhd. v. Pusaka Warisan Sdn. Bhd.* [1998] 2 CLJ 909). Guided by the above stated principles, we will now consider the issues at hand.

It is not in dispute that in the present case, the memorandum of appeal was filed twice, once together with the appeal record which was filed on 21 May 1998, and the second time it was filed separately on 8 October 1998. We agree with the learned counsel for the respondent that in view of the fact that no requisite filing fees was paid with regard to the first memorandum of appeal, therefore, on that ground alone, it is defective and ought not to be considered by the court.

Further, O. 49 r. 3A(1) of the Subordinate Courts Rules 1980 ("SCR") clearly does not require the memorandum of appeal to be included in the appeal record, therefore, it is no excuse for the appellants to file the memorandum of appeal together with the appeal record. Apart from that, the prescribed time for the filing of the appeal record is six weeks from the service of Form 141 whereas the prescribed time for filing of the memorandum of appeal as provided in O. 55 r. 2(1) of the Rules of the High Court 1980 ("RHC") is 14 days from the date of service of Form 141.

For the above reasons, we hold that the application for extension of time for the filing of the memorandum of appeal could only be considered in relation to the second memorandum of appeal filed on 8 October 1998.

Both before us and in the court below, the learned counsel for the appellants contended that the delay in filing of the memorandum of appeal was due to the ambiguity and uncertainty as to whether the memorandum of appeal has to be filed separately within 14 days from the receipt of Form 141 or whether it has to be filed together with the appeal record within six weeks from the receipt of Form 141. The learned judge did not agree with the submission of counsel for the appellants. Her reasons are as follows:

> On this issue, upon careful consideration of the rules referred to, the authorities cited by Counsel for the Appellant as well as the Respondent, I am of the view that the Appellant's Counsel was clearly wrong in arriving at such a conclusion. I hold that there are no conflicting provisions in the HCR and SCR as to the mode and the time frame for the filing of a Memorandum of Appeal after a full trial. On the contrary I am of the view that the mode and time frame to be observed as provided by RHC is crystal clear, unambiguous and is open to only one interpretation, and that is, that as submitted by the Respondent's Counsel. The rule to be observed in an appeal after a full trial is Order 55 r. 2 HCR (as amended by P.U.(A) 462/90 which came into force on 1.1.91) and O. 55 r. 4(3) which is within 14 days from the date of service of the 141 Notice. I further hold that the Appellants' Counsel erred in relying *inter alia*, the Court of Appeal decision of *Yupapom* and *Kwong Yik Bank Bhd.* as being relevant in the circumstances of this appeal. I am in agreement with the submission of Counsel for the Respondent that the confusion that exists is confined to interlocutory appeals and not to an appeal after a full trial. The delay that had led to the late filing of the Memorandum of Appeal is clearly attributable to a mistake or oversight on the part of the Appellants' Counsel himself.

The learned counsel for the appellants contended that there are two line of authorities which deal with the interpretation of O. 49 r. 3 of the SCR and O. 55 r. 2(1) of the RHC. In *Kuching Pharmacy Sdn. Bhd. v. JL Morison Son & Jones (M) Sdn. Bhd.* [1990] 1 CLJ 508; [1990] 2 CLJ (Rep) 293, Haidar J (as he then was) held that the appellant has six weeks from the date of receipt of Form 141 to file the memorandum of appeal. This case was followed by *Shafie b. Ahmad v. Hajjah Fatimah bt. Ahmad & 3 Ors.* [1991] 3 CLJ 2217; [1991] 3 CLJ (Rep) 719. In *Kuching Pharmacy (supra)*, Haidar J premised his finding on the following grounds:

> In the light of the above cases, it seems to me a sensible interpretation can well be put upon O. 55 r. 2(1) of the RHC. The said provision can be interpreted, so as to do justice, by inserting the words 'or within six weeks from the receipt of the notification referred to in O. 49 r. 3A sub-r 3 of the Subordinate Court Rules 1980, as the case may be', after the words 'O. 49 r. 3 sub-r (2)' in O. 55 r. 2(1) of the RHC. If those words are inserted, it means that the appellant who is represented will have six weeks to file the memorandum of appeal in line with the period prescribed under O. 49 r. 3A(3) of the SCR where the appellant who is represented will have to file the record of appeal as well. My view is further fortified by O. 55 r. 2(2) which requires the appellant within the like period to serve each respondent with a copy of such memorandum and a copy of the appeal record. If the words suggested are not inserted therein, we are not giving effect to the provisions in O. 55 rr. 3 and 4 of the RHC, thereby giving rise to an absurd and unjust situation.

> The requirement of the appellant to file the memorandum of appeal is further supported by a similar provision under r. 62(1) of the Rules of the Supreme Court 1980 in respect of appeal from the High Court to the Supreme Court. The object of the necessity of the memorandum of appeal is obvious so that the respondent and the appellate court will know the grounds of objection to the decision appealed against and that no party is caught by surprise. My view is fortified if we look at the provisions under rr. 3 and 4 of the RHC regarding cross-appeal by a respondent and the amendment. In my view, by inserting those words, everything fits together. Such a construction will 'provide the general legislative purpose' underlying the provision so as to do what the Rules Committee would have done, had they had the situation in mind.

Vohrah J (as he then was) in *Shafie b. Ahmad (supra)* did not give any reason why he agreed with the stand taken by Haidar J.

The other side of the divide are the cases of *Elayachee v. Woo Siu Tip* [1991] 3 MLJ 108 and *Hj. Abdul Ghani bin Kesah v. Tuan Ahmad bin Tuan Man* [1990] 3 MLJ 45 which held that the memorandum of appeal must be filed within 14 days from the receipt of Form 141. Taking the latter case first there, Lamin J (as he then was) in so holding reasoned as follows:

> As I have said earlier that there is only one solitary provision in the rules that regulates the filing of the memorandum of appeal and that is found in r. 2(1) of O. 55 RHC 1980. Now, the thrust of this provision is to lay down the policy of the 14-day rule by which the memorandum of appeal is to be filed. Before the introduction of r. 3A, this 14-day rule was made applicable to both the unrepresented appellant and the appellant represented by counsel. This provision has not been amended and there is not a hint anywhere even impliedly that this policy of the 14-day rule is to be abandoned or to operate against an appellant represented with counsel. There is no valid reason for it not to be retained. There is also no valid reason why he must be given more time than an appellant without counsel. So I am of the view that upon service of the notification under sub-r (3) of rule 3A, he will have 14 days within which he is to approach the court for the notes of evidence and to file his memorandum of appeal. For practical convenience, in the same notification he can be informed of two things, namely, he is given six weeks to file his appeal record and 14 days to file his memorandum of appeal.

In *Elayachee (supra),* Eusoff Chin J (as he then was) had the benefit of considering both the decisions by Haidar J and Lamin J in the cases cited above. Eusoff Chin J discussed at length O. 49 r. 3(1) of the SCR as amended by PU(A) 462/90 and summarised the position as follows:

> ... a memorandum of appeal does not form part of the appeal record. Therefore, the period of six weeks under O. 49 r. 3A(3) of the SCR, which applies to the filing of appeal record, cannot be applied to the period within which to file the memorandum of appeal.
>
> Order 55 r. 2(1) of the RHC specifically deals with the memorandum of appeal. The memorandum must be in Form 113A found in the list of forms in the RHC. The memorandum must be filed in the High Court in duplicate. The period stated by this rule within which the memorandum of appeal is to be filed, is 14 days from the service of Form 141 by the subordinate courts on the appellant or his counsel. To hold that six weeks should be the period within which to file the memorandum of appeal in a case where the appellant is represented by counsel would lead to absurdity because even an unrepresented appellant is given only 14 days from the service of Form 141 to file his memorandum of appeal to the High Court.

And further down, he observed:

> Order 55 r. 4(3) of the RHC states that where a memorandum of appeal is not filed within the prescribed time, and no sufficient ground is shown for the delay, the appeal must be dismissed.

Having examined O. 49 rr. 3 and 3A of the SCR and O. 55 r. 2(1) of the RHC, we prefer the view expressed by Lamin and Eusoff Chin JJ to that of Haidar J. On that premise, we agree with the learned High Court judge that O. 55 r. 2(1) of the RHC on its proper construction admits of no ambiguity as contended by learned counsel for the appellants.

In any event in the present case, we do not think that the delay in filing the second memorandum of appeal could in any way be attributed to the alleged ambiguity. The second memorandum of appeal was filed way pass the six week period prescribed for the filing of the appeal record. The error on the part of the appellants' former solicitors is not in filing the memorandum of appeal out of time but rather for incorporating the memorandum of appeal in the appeal record. And by the time the solicitors realised the error, six months had elapsed from the time of service of Form 141. The second memorandum of appeal was then filed. As we see it, this delay in filing the memorandum of appeal has got nothing to do with the alleged ambiguity in O. 49 rr. 3 and 3A of the SCR or O. 55 r. 2(1) of the RHC. It arose purely out of the mistake of the appellants' solicitors in failing to file the memorandum of appeal separately from the appeal record as required by the rules.

The next question is whether the court has a discretion to extend the time. In considering the question, the learned High Court judge referred to the original O. 55 r. 2 of the RHC and the current one. The former reads as follows:

> 2(1) The appellant **shall**, within fourteen days from the date of service on him of the notice referred to in Order 49, rule 3 sub-rule (2) of the Subordinate Courts Rules, 1980 **or within such extended time as the High Court may allow**, file in the High Court in duplicate a memorandum of appeal in Form 113A. (emphasis added).

The present provision of O. 55 r. 2(1) reads as follows:

> 2(1) The appellant **shall**, within fourteen days from the date of service on him of the notice in Form 141 under Order 49, rule 2 sub-rule (4) or rule 3 sub-rule (2) of the Subordinate Courts Rules 1980 (as the case may be), file in the High Court in duplicate a memorandum of appeal in Form 113A. (emphasis added).

She held that since the Rules Committee had removed the words "or within such extended time as the court may allow" appearing in the original rule, therefore, the 14 days prescribed under the present provision is a mandatory provision and has to be strictly complied with. With respect to the learned High Court judge, we do not think that the deletion of those words would deprive the court of its discretion to extend time, for such a discretion is expressly conferred by O. 3 r. 5(1) of the RHC which deals with extension or abridgment of time specified in the rules. On that premise, we hold that under the present provision of O. 55 r. 2(1) of the RHC, the court still has the discretion to extend the time prescribed therein.

Having held that the court has a discretion to extend the time, the next issue to be considered is whether the learned High Court judge in the circumstances had properly exercised her discretion in dismissing the application. Relying on the Federal Court decision in *Gan Hay Chong v. Siow Kian Yuh & Anor*. [1975] 2 MLJ 129, the learned High Court judge held that ignorance of procedural law does not constitute a sufficient ground upon which the court could exercise its discretion to enlarge time. However, after reading the judgment of the Federal Court, we agree with the learned counsel for the appellants that the Federal Court did not lay down the general rule that a mistake by a solicitor was not a sufficient ground for granting an extension of time to file a notice of appeal or a memorandum of appeal. In that case, the Federal Court, however, did not exercise their discretion in favour of the appellant on the particular facts of the case. This is clear from the following excerpt of the judgment of the court which reads:

> Since the learned trial judge had, with regret, proceeded on a wrong principle, it behoves us, sitting on appeal, to examine whether the facts merit the exercise of judicial discretion in favour of the appellant. On the facts as disclosed, it does not appear possible to challenge Mr. Atma Singh's contention that he had read the 14 day period in rule 2(5) of Order XXXIX Subordinate Court Rules to run from the date of service of the appeal record on him and not from the service of the notice that the appeal record was ready but he was advised well within time by a letter dated May 28, 1973 from the solicitors for the respondents of the requirement in Order 59 rules 2(1) and (2) of the Rules of the Supreme Court and he could not really contend that he remained in ignorance of this rule. He would or should have been disabused of his earlier mistake by this later advice.
>
> I feel fairly confident that if the learned trial judge had applied the right principle to the facts, he would have come to the same conclusion and refused leave.

In the circumstances, we find that the learned High Court judge had acted on a wrong principle. Therefore, it behoves us to consider whether there is sufficient material before us to merit the exercise of the discretion in favour of the appellants.

In the present case, the solicitors for the appellants had committed two mistakes: firstly, in incorporating the memorandum of appeal into the appeal record and secondly, in filing the memorandum of appeal outside the 14 day time frame as prescribed by O. 55 r. 2(1) of the RHC. Having realised their mistakes, the solicitors then filed a separate memorandum of appeal on 8 October 1998, which is six months outside the time prescribed and no application for extension of time was made at that stage. The application for extension of time was only filed on 25 May 1999 after the respondent's solicitors gave notice of preliminary objection on 14 December 1998.

From the above, it is clear that the non compliance was due to the mistake of the former solicitors of the appellants and the appellants are not at all to blame. In any event, the memorandum of appeal had been filed earlier together with the appeal record. Therefore, the respondent have had notice of the grounds upon which the appellants are relying in the appeal. The same memorandum of appeal was filed again on 8 October 1998. In the circumstances, the respondent could not be said to have been seriously prejudiced by the non-compliance of the rule.

The learned counsel for the appellants also seeks to rely on the case of *Lee Guat Eng v. Tan Lian Kim* [1985] 2 MLJ 196 where the Supreme Court following *Ratnam v. Cumarasamy (supra)* held that the court has a wide discretion in granting or refusing extension of time under O. 55 r. 4(3) of the RHC. At p. 196, the Supreme Court observed:

> Order 3 rule 5 of the Rules of the High Court 1980 gives the court discretion to extend time. The court may extend or abridge the period within which a person is required by the rules to do any act on such terms as the court may think just. The word "just" would appear to enable the court to neutralise the rigidity of the rules in appropriate cases. I would rather that we look at it as Lord Guest said in *Ratnam v. Cumarasamy* that adherence to the rules are merely to provide a "time-table for the conduct of litigation." The rules should not be used to shut out litigants in every case of non-compliance.

The application for extension of time in *Lee Guat Eng* was granted by the Supreme Court on the ground, *inter alia*, that the application there was only for extension of time to serve the memorandum of appeal and the appeal record on the respondent whereas the filing in court of the same had been done well within the prescribed time.

The appellants further seek to rely on the decision of this court in *Md. Amin Md. Yusof & Satu Lagi lwn. Cityvilla Sdn. Bhd.* [2004] 2 CLJ 57. In that case, there was failure to file the appeal record and after a delay of 21 months, the application for extension of time was filed. The court allowed the application on the grounds that the delay in filing the appeal record would not prejudice the merit of the application as there was sufficient and reasonable explanation given for the delay. The court further found that the delay was due to the fault of the former solicitors of the appellants and the appellants were not to be blamed.

As against the cases cited above, we have the case of *Alloy Automative Sdn. Bhd. v. Enkei Automative Co. Ltd. & Anor* [1997] 2 CLJ 392. In that case, the respondents commenced an action seeking a declaration as to a certain trade mark against the appellant. In the absence of the appellant or its solicitors, the judge granted the respondents the order in terms of their application. The appellant applied for the order to be set aside but this was refused by the court. The appellant appealed. In appealing against the court's order, the appellant failed to file its memorandum and record of appeal – the reason for not having done so was said to be the mistake of the appellant's former solicitors. The appellant applied for extension of time to file and serve its memorandum and record of appeal.

In dismissing the appeal, this court held that from the facts of the case, it was clear that the appellant's solicitors had blatantly disregarded court procedure in failing to file the memorandum and record of appeal within the required time. The appellant was also partially to blame for the delay and the appellant should have been more vigilant as to the state of its pending matter and should have checked on its solicitors' actions. Furthermore, the court held that the appellant's claim was, on its merits, heard and dismissed by two High Court judges.

In the present case, the application is only for extension of time to file and serve the memorandum of appeal. The appeal record had been filed earlier within the stipulated time. Even the memorandum of appeal had been filed earlier together with the appeal record, *albeit* erroneously. After realising the error, the appellants' solicitors filed the memorandum of appeal out of time and this application, even though made after the notice of preliminary objection, was merely to regularise the filing and service of the memorandum of appeal. In the circumstances, we do not think that the conduct of the appellants' solicitors could be regarded as a blatant disregard of the rules of court. There was indeed a misapprehension of the rules of court but remedial steps were taken to comply with the rules. As stated by this court in *Thiruchelvasegaram a/l Manickavasegar v. Mahadevi a/p Nadchatiram* [1998] 4 CLJ 883, the primary consideration in exercising discretion to extend time is whether the party can clearly demonstrate that there was no intention to ignore or flout the order and that the failure to obey was due to extraneous circumstances.

Further, we are of the view that there are merits in this appeal. Here, the learned judge had awarded a sum of RM66,250 as general damages for wrongful termination against the 1st appellant and also a sum of RM100,000 as aggravated damages for defamation against both appellants. The issue is whether the respondent is entitled to damages both for wrongful dismissal and for defamation at the same time. Also, the appellants had contended that that there is merit in the appeal at least on the quantum of damages awarded for defamation in the light of the recent decisions of this court. (See *Karpal Singh Ram Singh v. DP Vijandran* [2001] 3 CLJ 871; *Liew Yew Tiam & Ors v. Cheah Cheng Hoc & Ors.* [2001] 2 CLJ 385; *Joceline Tan Poh Choo & Ors. v. V. Muthusamy* [2003] 3 CLJ 705.)

For the reasons given above, we hold that the learned High Court judge, in coming to her decision, had acted on a wrong principle and had she applied the correct principle to the facts of the present case, she would have arrived at a different conclusion. Accordingly, we allow the appeal by the appellants and grant the appellants the extension of time from 23 April 1998 to 8 October 1998 to file and serve the memorandum of appeal dated 18 May 1998. We make no order as to costs both here and in the court below. The deposit is to be refunded to the appellants. Consequently the matter is remitted to the High Court to be heard on the merit.